

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 16, 2005 Session

TERRY BRAZIER
v.
CROCKETT HOSPITAL, KARI FITZPATRICK,
AND WILLIAM L. BELL, JR., M.D..

An Extraordinary Appeal from the Circuit Court for Lawrence County
No. CC-1348-03 Stella Hargrove, Judge

No. M2004-02941-COA-R10-CV - Filed on July 20, 2006

This is a medical malpractice action. The defendants in this action filed a motion with the trial court for permission to conduct *ex parte* conferences with the plaintiff's non-party treating physicians. The trial court granted the motion. Thereafter, the plaintiff's attorney sent a letter to the plaintiff's treating physicians stating his position that, despite the trial court's order, any private contact with the defendants' attorneys would violate the plaintiff's rights under HIPAA and would constitute a breach of physician-patient confidentiality. The defendants filed a motion for a protective order and for sanctions. After a hearing, the trial court reiterated its order granting the defendants *ex parte* access to the plaintiff's non-party treating physicians and granted the defendants' motion for a protective order and for sanctions. The plaintiff filed an application with this court for an extraordinary appeal, which was granted. We now reverse and remand in light of the Tennessee Supreme Court's recent decision in *Alsip v. Johnson City Med. Ctr.*, No. E2004-00831-SC-S09-CV, 2006 WL 1765900 (Tenn. June 29, 2006).

**Tenn. R. App. P. 10 Extraordinary Appeal By Permission; Judgment of the
Circuit Court is Reversed and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Brian Schutte, Bowling Green, Kentucky, and Larry L. Crain, Brentwood, Tennessee, for the appellant, Terry Brazier.

C.J. Gideon, Jr., Margaret Moore, and Chris Tardio, Nashville, Tennessee, for the appellees, Crockett Hospital, LLC, and Kari Fitzpatrick.

Marty R. Phillips and Craig P. Sanders, Jackson, Tennessee, for the appellee, William L. Bell, Jr., M.D.

OPINION

On July 21, 2002, Plaintiff/Appellant Terry Brazier (“Plaintiff”) sustained personal injuries as a result of a motorcycle accident. Soon after the accident, he was transferred to the Emergency Department at the Defendant/Appellee Crockett Hospital, LLC (“the Hospital”). While at the hospital, an x-ray technician allegedly dropped Plaintiff four to five inches when transferring him from his hospital bed to an x-ray table. Since that day, Plaintiff has been a permanent paraplegic from the mid-chest down.

On February 25, 2003, Plaintiff filed this medical malpractice action against the Hospital and Defendant/Appellee Kari Fitzpatrick (“Fitzpatrick”) arising out of his injuries. Plaintiff later amended his complaint to include Defendant/Appellee William L. Bell, Jr., M.D. (“Dr. Bell”) as a defendant.¹

On February 13, 2004, Dr. Bell filed a “Motion to Permit Access to Plaintiff’s Treating Physicians and Medical Providers,” seeking to conduct *ex parte* conferences with Plaintiff’s non-party treating physicians. On February 20, 2004, the Hospital and Fitzpatrick joined in Bell’s motion, incorporating by reference the memorandum of law filed by Dr. Bell. On July 9, 2004, the trial court entered an order granting the Defendants’ motion to speak *ex parte* with Plaintiff’s healthcare providers with the proviso that the healthcare providers “are only allowed to discuss, *ex parte*, medical issues, care, treatment and opinions relevant to this action.”

A few days later, counsel for Plaintiff sent a letter to Richard Berkman, M.D. (“Dr. Berkman”), one of Plaintiff’s treating physicians. The attorney’s letter informed Dr. Berkman that, notwithstanding the trial court’s July 9, 2004 order, Plaintiff maintained the “position that any such private contact between you and the attorneys representing the defendants in this case would pose a violation of [Plaintiff’s] federally protected rights under . . . HIPAA [the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d, *et seq.*].” The letter told Dr. Berkman that speaking with defense counsel would be “against the express desires and wishes of your patient, Terry Brazier, and will be regarded by him as a serious breach of confidence.” After Dr. Berkman received the attorney’s letter, an unidentified person in Dr. Berkman’s office wrote a notation on July 14, 2004, “Per Scott do not talk to Atty.” Counsel for Plaintiff later conceded at a court hearing that the same letter was also sent to another of Plaintiff’s physicians, Dr. McCombs.

After the Defendants learned that these letters had been sent, on November 8, 2004, the Defendants filed a joint motion for a protective order and for sanctions under Rule 26.03 of the Tennessee Rules of Civil Procedure. The Defendants’ joint motion asked the trial court to enter an order prohibiting Plaintiff or his attorneys from sending any letters to Plaintiff’s treating physicians or medical care providers that would interfere with their ability to conduct *ex parte* conferences with these medical care providers.

¹The three defendants are collectively referred to herein as “Defendants.”

On November 23, 2004, the trial court heard arguments on the Defendants' joint motion. On December 9, 2004, the trial court entered three orders. One was an amended order reiterating the trial court's July 9, 2004 order granting the Defendants' original motion to conduct *ex parte* conferences with the Plaintiffs' non-party treating physicians and medical providers. In a separate order, the trial court granted the Defendants' motion for a protective order and sanctions, finding that the letters from Plaintiff's attorney to Drs. Berkman and McCombs were "sent in flagrant disregard for the Court's ruling in an attempt to circumvent the ruling of the Court and chill the effect of the Court's order." Consequently, the trial court required Plaintiff's counsel to send the same physicians a corrective follow-up letter, making it clear that the "court has authorized defense counsel to conduct *ex parte* meetings with Terry Brazier's treating physicians and health care providers if those persons chose to meet with defense counsel." In the third order, the trial court established the amount of the Defendants' attorney's fees to be paid by Plaintiff as sanctions. On December 13, 2004, Plaintiff filed an application with this Court pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure for an extraordinary appeal from the trial court's December 9, 2004 orders. We granted Plaintiff permission to appeal.

On appeal, Plaintiff makes the same arguments as he made in the trial court below, that the December 9, 2004 orders entered by the trial court violate his rights as protected under HIPAA and permits defense counsel to conduct discovery that is improper and that is not authorized by the Tennessee Rules of Civil Procedure. Since oral argument was presented in this appeal, the precise issue presented was addressed by the Tennessee Supreme Court in *Alsip v. Johnson City Med. Ctr.*, No. E2004-00831-SC-S09-CV, 2006 WL 1765900 (Tenn. June 29, 2006).² In a unanimous decision, the Supreme Court announced definitively that "such *ex parte* communications [between a plaintiff's non-party treating physicians and defense counsel] violate the implied covenant of confidentiality that exists between physicians and patients and that public policy does not require the voidance of this covenant." *Alsip*, 2006 WL 1765900, at *1. The Court joined several other jurisdictions which have concluded that "formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process" *Id.* at *4 (quoting *Crist v. Moffatt*, 389 S.E.2d 41, 45 (N.C. 1990) (citing *Petrillo v. Syntex Lab., Inc.*, 499 N.E.2d at 952, 963 (Ill. Ct. App. 1986); *Roosevelt Hotel Ltd. P'ship v. Sweeny*, 394 N.W.2d 353, 356 (Iowa 1986); *Anker v. Brodnitz*, 413 N.Y.S.2d 582, 585-86 (N.Y. Sup. Ct. 1979))).

The holding in *Alsip* supports the Plaintiff's argument in this appeal and requires a different result than that reached by the trial court. Therefore, we reverse the trial court's decision and remand the case for further proceedings in light of the Supreme Court's decision in *Alsip*.

²We note that, at the time this Opinion was filed, the Supreme Court Opinion in *Alsip* had not yet been released for publication and was subject to revision or withdrawal. However, in the interest of expediency, considering the length of time already invested in this case, we remand at this juncture and permit the trial court to consider the Supreme Court's analysis in light of the limitation noted.

The decision of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with this Opinion. Costs on appeal are to be taxed to the Appellees Crockett Hospital, LLC, Kari Fitzpatrick, and William L. Bell, Jr., M.D., for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE